United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL
WITH PROOF
OF SERVICE

74-1271

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/S

ESMERALDO GAZARD COLON,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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ESMERALDO GAZARD COLON,

Appellant,

-against-

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Appellee.

Preliminary Statement

Esmeraldo Gazard Colon was arrested after a warrantless search on April 23, 1968 and charged with possession of heroin. He was subsequently indicted on a single count of receiving and concealing heroin in violation of Title 21 United States Code, Sections 173 and 174.

A hearing on a motion to suppress the seized narcotics was held on October 14 and 15, 1968 before Hon. Constance Baker Motley, District Judge, Southern District of New York. The motion was denied.

A trial was held before Judge Motley on January 7, 8, and 9, 1969. That trial resulted in a mistrial.

Mr. Colon's second trial, also before Judge Motley commenced on March 10, 1969 and continued until

March 12 when the jury returned a verdict of guilty.

On April 22, 1969 Mr. Colon was sentenced to a term of 12 years. A motion for bail pending appeal was denied and petitioner began serving his sentence immediately. He is presently incarcerated in Atlanta, Georgia.

On December 11, 1968 the United States Court of Appeals for the Second Circuit affirmed Mr. Colon's conviction in a per curiam opinion. That opinion is reported at 419 F.2d 120.

A motion to reduce the sentence was made on January 9, 1970. The motion was denied.

A motion to vacate sentence pursuant to 28, United States Code §2255 was filed on

Argument was had on the motion before Hon. Constance Baker Motley on April 5, 1973 and again on June 12, 1973. The petition was denied on January 21, 1974. This is an appeal from that denial.

Statement of Facts

During the early morning hours of April 23, 1968 Federal Bureau of Narcotics and Dangerous Drugs Agent Richard Moser allegedly received a telephone call at his residence from an informer (A-23). Agent Moser contacted his fellow agents, Walter Miller and Peter Pallatroni, and arranged a meeting with the informer (A-24).

This informer had begun working for Agent Moser the preceding November of 1967 after he had been arrested for two sales of narcotics and possession of narcotics (A-25).

The agents allegedly met the informer in the Bronx. At this time he told them that he had seen Henry Colon the previous night in possession of narcotics and that he had heard that Mr. Colon would be returning to the city the following morning with a supply of heroin (A-26 - A-28).

The informer told the agents that he had located Mr. Colon's car parked on Walton Avenue between 182nd and 183rd Streets (A-28). He allegedly told the agents that Mr. Colon usually had narcotics under the front seat of his automobile (A-29). The informer then allegedly conducted the officers to the location where

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Page numbers refer to the appendix on appeal.

Mr. Colon's automobile was parked and left (A-30).

The agents took up surveillance on Mr. Colon's car (A-31). At 10:30 A.M. the agents observed Mr. Colon approach his vehicle (A-32). According to the testimony of the agents, Mr. Colon opened the car door, leaned into the car, withdrew, and re-entered (A-32 - A-33).

Mr. Colon started his car and proceeded several blocks (A-33 - A-37). He stopped for a red light at 181st Street and the Grand Concourse, and the agents surrounded the car and ordered Mr. Colon out (A-36-A-37). Agent Moser placed Mr. Colon under arrest for a violation of the federal narcotics law (A-36). Mr. Colon was then searched, handcuffed, and informed of his constitutional rights (A-36).

Agent Moser removed the keys from the vehicle, and with Agent Pallatroni walked Mr. Colon to the rear of the car (A-38-A-39). Agent Moser opened the trunk of the vehicle and gave it a quick search (A-40). After this Agents Moser and Miller searched the interior of the car (A-41). Agent Moser searched the passenger side, Agent Miller the driver's side (A-41). As this transpired a large crowd gathered (A-42).

Agent Miller testified that he searched the front driver's side of the vehicle (A-42). He searched underneath the mats, ran his hand across the back of

the dashboard and then placed his hand underneath the driver's seat (A-43). It was here that Agent Miller allegedly found a tin-foil package later determined to contain heroin (A-43).

Agent Miller extended the narcotics toward Mr. Colon and asked him what it was (A-43). Immediately Mr. Colon began protesting his innocence and exclaiming that the drugs had been planted in the car (A-41, A-43 - A-44). All three agents testified that Mr. Colon reacted in this way.

At trial two witnesses testified that they saw Agent Miller remove the narcotics from his own coat pocket and pretend to find the packet under the seat (A-45 - A-47). Mr. William Everich and Mr. Carlos Cruz came forward in response to advertisements for witnesses to the incident which had been placed in Spanish language newspapers (A-48 - A-49).

At the suppression hearing Agent Walter Miller first testified that on the morning of April 23, 1968 he received a telephone call from Agent Richard Moser. He testified that during this call Agent Moser told him that Mr. Colon was expected to be bringing narcotics into New York, that the narcotics were to be transported in Mr. Colon's car and that the car was then parked at Walton Avenue between 182nd and 183rd Streets in the Bronx (A-50).

After Agent Miller testified, Mr. Carlos Cruz, a taxicab driver, was called as a witness for the defendant. Mr. Cruz testified that he saw Agent Miller withdraw a package wrapped in silver paper from his pocket and reach into Mr. Colon's car (A-51 - A-52).

In rebuttal the government recalled Agents Miller and Moser. Agent Moser now testified that after he received a call from the informer he twice attempted to call Agent Miller but received no answer (A-53). In order to contact him, Agent Moser called the Westwood, New Jersey police headquarters and asked them to send an officer to wake Agent Miller (A-53 - A- 54). Agent Moser then testified that Agent Miller telephoned him at which time Agent Moser related the information he had received from the informer (A-54).

Agent Miller was recalled as a witness. He testified that he was awakened by the pounding on his door by a local policeman (A-55). Agent Miller now swore that the policeman instructed him to call Agent Moser (A-55 - A-56).

At Mr. Colon's first trial, held on January 7, 8, and 9, 1969, Agent Miller testified that he was awakened by his son who told him that a local policeman was at the front door (A-57). Agent Miller swore that he had a conversation with the officer and then telephoned Agent Moser (A-57).

At the second trial Agent Miller again retold the story of his awakening. This time Agent Miller testified that his wife awakened him and told him that a local policeman wanted to speak with him (A-58).

POINT I

THE INFORMANT WAS A MATERIAL WITNESS ON THE ISSUE OF GUILT OR INNOCENCE AND HIS IDENTITY SHOULD HAVE BEEN DISCLOSED TO THE APPELLANT.

The appellant, Esmeraldo Colon, sought and was denied the name of the informant who allegedly supplied Federal Agents Miller, Moser, and Pallatroni with information leading to Mr. Colon's arrest.

The record indicates that the informer told the agents (1) that Mr. Colon had possessed narcotics on the preceding night; (2) that Mr. Colon was bringing narcotics into the city; and (3) that Mr. Colon kept narcotics under his carseat. In addition, and importantly, the informer took the agents to the location where Mr. Colon's car was parked.

The testimony of the federal agents called as prosecution witnesses establishes that Esmeraldo Colon claimed from the very first that he was innocent of the charges against him. The thrust of his defense has always been that he did not possess any narcotics and that the heroin allegedly found in his car was planted.

The testimony of the authorities directly conflicts with the assertions of Colon and the testimony of Everich and Cruz. The agents claim that they were informed that Colon would be bringing narcotics into the city and that they would be stored under the

driver's seat of his automobile. After being conducted to the exact location, the officers testified they established surveillance of Mr. Colon's car, observed him approach the vehicle, look around, and lean into it "as if he were placing something under the seat." The officers let Colon drive away, not attempting to stop him until a few minutes later.

Esmeraldo Colon's only defense was and is that he had no narcotics in the car. He seeks the testimony of the alleged informer to substantiate his claim. This testimony is not needed merely to establish the lack of probable cause for the search, but because it goes to the very root of Appellant's claim of innocence.

Mr. Colon was charged with possession of narcotics and the informer was a witness to the alleged crime. He alone has admitted having knowledge of the narcotics and the exact location of the Colon car. In light of the defense presented by Mr. Colon, the knowledge of the informer became material to the issue of guilt or innocence.

Two witnesses supported Mr. Colon's defense that the narcotics were planted. The federal agents contradicted that defense. One witness possessed knowledge which could have resolved this conflict and the question of Mr. Colon's culpability. It is incredible

that the jury would have to speculate on questions to which further evidence could readily have been adduced.

The informer was in a unique position to shed light on the conflict in the testimony. Although not a witness to the arrest, we know from his statements as related by the agents, that he allegedly possessed information about the existence of the narcotics and the location of the Colon automobile. If the informer knew of the drugs, he might well be able to testify about Mr. Colon's awareness of their existence, and that knowledge was a material element of the crime charged.

The testimony of the informer is essential for another reason. The conduct of three agents of the United States government was called into question, not merely by Mr. Colon, but by two witnesses to the arrest. The informer, if indeed there ever was one, could testify as to the information he gave to the officers and his own knowledge of the presence of narcotics. That testimony could resolve the issue and lift the shadow on the conduct of the agents. Or that testimony, or the inability of the agents to produce the mysterious informer, could substantiate the defense claim that the narcotics were planted in Mr. Colon's car by the agents.

It is remarkable that the government would prefer to allow a serious doubt to be cast on the reputation of its agents rather than produce an informer to testify. That oddly earnest desire to protect an informer at the possible expense of the credibility of its agents raises in itself doubt concerning the very existence of any informer. But whatever the desire of the government as adversary, justice should not countenance the concealment of a material witness.

Without the testimony of the informer Esmeraldo Colon was denied a fair trial. He was denied the opportunity to call the one witness who was able to aid his defense, to give relevant testimony to his innocence. Without that testimony Mr. Colon was unable to present an effective defense.

The right of a defendant in a criminal prosecution to know the identity of an informer depends on the possible content of the informer's testimony.

In Rovario v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) the Supreme Court held that:

> "Where the disclosure on an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause, the privilege must give way."
>
> 353 U.S. at 60, 61 1 L.Ed.2d at 645, also Schier v. United States, 305 U.S.251, 59 S.Ct. 174, 83 L.Ed. 151 (1938)

The right of the government to keep secret the

name of person who furnishes information concerning the commission of crimes is recognized as necessary to encourage the flow of such information. 8 Wigmore Evidence §2374 (McNaughton rev. 1961) The Supreme Court, in McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62, opined that a rule allowing defendants to routinely demand the disclosure of an informant's identity in order to challenge the existence of probable cause to arrest or search would severely hamper "society's defensive arsenal." 386 U.S. 306.

In Rovario the Court held that no fixed rules with respect to disclosure could be developed. The right to disclosure had to depend on the balancing of the public's interest in protecting the flow of information from informers against the individual's right to prepare his defense. Whether non-disclosure is error depends on this balance with the nature of the crime charged, the possible defenses, and the possible significance of the informer's testimony taken into consideration. Rovario v. United States, 353 U.S. 53 at 60-62.

In Rovario the Court reviewed the possible testimony to be offered by the informer and concluded that it was error to deny the defendant the right to bring out that testimony, 353 U.S. 53, at 63.

The McCray case arose from a preliminary hearing

at which the existence of probable cause was challenged by the defendant. The posture of that case and the language of the Court itself, in its decision, establish that McCray is wholly inapplicable to the situation presented in the case of Esmeraldo Gazard Colon.

The most important distinguishing factor is that the issue here is guilt or innocence, not the existence of probable cause. The informant allegedly used by Federal Agents Moser and Miller can testify directly on the material issue of guilt or innocence of the petitioner.

No less than five times did the Supreme Court indicate that the basic issue in McCray was not the guilt or innocence of the defendant, but the existence of probable cause. That is a crucial distinction, as the language of the Court indicates.

The informer's privilege is accorded as a matter of policy. The manner in which the Fourth Amendment is enforced to protect the citizenry against unconstitutional police action is also largely a matter of policy. The granting of the informer's privilege when the issue is the existence of probable cause is the result of a balancing of these policies.

In McCray the Supreme Court quoted Judge Weintraub of the Supreme Court of New Jersey in State v. Burnett, 42 N.J. 377, 201 A.2d 39.

> "We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. Here, however, the accused seeks to avoid the truth. The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, not because its probative force is diluted in the least by the mode of seizure but rather as a sanction to compel enforcement officers to respect...the Fourth Amendment.
>
> 386 U.S. 300 at 306.

The Court in McCray held that the Fourth Amendment was served if a judicial mind was satisfied that the police acted in good faith on information received and that the basis for their reliance on the credibility of the information itself is exposed to the Court.

The emphasis that the Court in McCray placed on the posture of that case makes it unmistakable that McCray is not in point where the informer has knowledge bearing directly on the issue of guilt or innocence.

In reviewing its own decision in Rovario v. United States, 353 U.S. 53, 77 S.Ct. 623 to distinguish it from McCray, the Supreme Court perfectly outlined the issue herein. First, the Court pointed out that the issue in Roviaro was the fundamental one of innocence or guilt. 386 U.S. 300, at 309.

Secondly the Court reiterated its holding in Rovario that where the disclosure of the informer's

identity would be "relevant or helpful to the defense of an accused," or was "essential to a fair determination of a cause the privilege must give way." 386 U.S.300, at 310.

The testimony of the prosecution and defense witnesses is directly in conflict. On that conflict hangs the fair determination of Esmeraldo Colon's case. The informant alone can establish the Appellant's guilt or innocence. If indeed he knew there were drugs in the Appellant's car, the Appellant has a right to cross-examine as to the source of that information. Mr. Colon was charged with possession of narcotics. His mental state, specifically his knowledge of the narcotics, is a material element of the crime. Therefore the nature and source of the information known to the informer bears directly on the issue of guilt or innocence.

If the informer did not give the federal agents the precise information they claimed, only the calling of the informant can contradict the self-serving hearsay statements of the officers. The precise information given to the officer is material to substantiating or impeaching their version of the facts. Simply put, the informer possess information vital to a fair determination of guilt or innocence and his identity should be disclosed. And, of course, there is the very real possibility that no informer ever existed

or that his role was somewhat different than related by the agents.

Mr. Colon does not seek to "avoid the truth" or "escape the inculpatory thrust of the evidence in hand." He seeks to blunt that thrust with the shield of truth constructed from the testimony of all the material and relevant witnesses. It is the government which obstructs the fair operation of justice by concealing the informer and preventing his testimony from reaching the jury.

The refusal to grant the Appellant the opportunity to call the informer as a witness is a direct assault on the presumption of innocence. The refusal to grant this confrontation can only be justified by accepting Mr. Colon's guilt as a presumption. The only defense the Appellant ever erected was that he had no knowledge of the "found" narcotics that they were planted. The presumption of innocence demands at the very least that he be given every opportunity to prove his defense. He has the right to call every witness who might aid him in rebutting the accusations of the government. Only by presuming that Mr. Colon did know the drugs were in the car can justice dispense with calling a witness on that issue.

Secret witnesses are inconsonent with our open system of justice. The privilege of the government to shield informers in apporpriate cases should not

be extended so that it becomes the burden of defendants to show what testimony will be forthcoming before they are entitled to call a witness on their behalf. The defense of a criminal charge is a difficult task. Proper preparation requires investigation and the interviewing of all potential witnesses. It is an individual's right to call all competant witnesses, and the abridgement of that right injures justice as well as the offended party.

The Appellant has demonstrated sufficient good faith to justify his demand to examine the informer. From the instant of his arrest Mr. Colon has made but one claim in the way of defense. The narcotics found were not his. His outraged statements made to the agents expressed this defense. These statements were related by every witness called to testify.

Mr. Colon's claim of "plant" is not without corroboration. The two defense witnesses uncovered through a publicity effort testified that they saw Agent Miller pull a package from his coat pocket and then pretend to "find" this same package under Mr. Colon's carseat.

The Appellant has established beyond question that there may exist a very real void in the evidence which could be filled by the testimony of the informant, if indeed there was such a person.

The refusal of disclosure prevents the Appellant from effectively establishing his defense. In light of the tenacity with which he has presented this defense and the obvious relevance of the testimony of the alleged informant, continued concealment of the latter's identity denies the Appellant a fair trial of his cause.

In addition to the authority of Roviaro, disclosure of the informer's identity would be in accord with the new Federal Rules of Evidence. Rule 510(c)(2) provides that if it appears from the evidence in the case or from other showing that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence the judge can demand an in camera showing by the government of facts relevant to a determination of whether the informer could supply such testimony. If it appears that the informer could give relevant testimony the informer's identity must be revealed or the cause dismissed.

The Appellant contends that he has more than adequately made the necessary showing and the informer's identity should be disclosed so that he can be called to give his testimony.

CONCLUSION

The identity of the informer should have been revealed.

Respectfully submitted,

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